

FEDERAL CIRCUIT COURT OF AUSTRALIA

*GREWAL v MINISTER FOR IMMIGRATION &
ANOR*

[2017] FCCA 1562

Catchwords:

MIGRATION – Application for Constitutional writ – Partner (Residence) (Class BS) subclass 801 visa – alleged relevance best interests of child – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 476

Migration Regulations 1994 (Cth) reg 1.15A, cl 801.221 of Schedule 2

Cases cited:

Minister for Immigration and Ethnic Affairs v Teoh (1994) 183 CLR 273

Applicant:	HARPREET GREWAL
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 3642 of 2015
Judgment of:	Judge Street
Hearing date:	5 July 2017
Date of Last Submission:	5 July 2017
Delivered at:	Sydney
Delivered on:	5 July 2017

REPRESENTATION

Solicitors for the Applicant:	Mr M E Arch Christopher Levingston & Associates
Counsel for the Respondents:	Mr D Hughes
Solicitors for the Respondents:	Sparke Helmore

ORDERS

1. The application is dismissed.
2. The applicant pay the first respondent's costs fixed in the amount of \$6,400.00.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 3642 of 2015

HARPREET GREWAL

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application for a Constitutional writ within the Court's jurisdiction under s 476 of the Migration Act 1958 (Cth) (the "Act") in respect of a decision of the Administrative Appeals Tribunal ("the Tribunal") made on 2 December 2015 affirming a decision of the delegate not to grant the applicant a Partner (Residence) (Class BS) subclass 801 visa.
2. The applicant is a citizen of India who first entered Australia on 7 February 2008 on a Student Subclass 573 visa. On 21 September 2012, the applicant applied for a Partner (Residence) (Class BS) subclass 801 visa on the basis of his relationship with the sponsor. The

primary criteria had to be satisfied by at least one applicant, and the other members of the family unit who were applicants for the visa need to only satisfy the secondary criteria.

3. Relevant to the primary criteria in the present case was cl 801.221(2) of Schedule 2 to the *Migration Regulations 1994* (Cth). The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 801.221 of the *Regulations* because the sponsor had withdrawn her sponsorship of the applicant and there is no evidence provided to demonstrate the applicant met cl 801.221(2A) of the *Regulations* in the decision dated 1 December 2014.

Review by Tribunal

4. The applicant applied for review to the Tribunal and was invited to and attended a hearing on 3 November 2015 to give evidence and present arguments. The applicant was also represented by his registered migration agent. The Tribunal identified the applicant's background and that on 1 September 2014 the sponsor notified the Department that she no longer supported the applicant's application for permanent residency, as the relationship had broken down.
5. The Tribunal correctly identified that the issue in the present case under cl 801.221(2) was whether the applicant meets the definition of spouse in s 5F of the *Act*, taking into account the requirements of reg 1.15A(3) of the *Regulations*.
6. The Tribunal referred to the parties' evidence that they had reconciled in May 2015. The Tribunal expressed concerns in relation to the financial aspects of the relationship. The Tribunal, in considering the nature of the household, considered that the evidence indicates that the applicant and sponsor have had a form of relationship under the same roof from time to time, but no more than that.
7. The Tribunal made reference to the sponsor's evidence that her application for an apprehended violence order against the applicant had ceased when the applicant had apologised to her and they had started taking up a way of talking to each other again after about six months of no communication.

8. The Tribunal made reference to the applicant having resuming cohabitation with the sponsor and her son on 22 May 2015 at Campbelltown. The Tribunal observed that at the time of the decision, the parties had lived together for a period just over six months. The parties married in India on 12 February 2012.
9. The Tribunal was not satisfied on the evidence that the applicant and the sponsor viewed their relationship as long term. The Tribunal was not satisfied the parties are committed to a spousal relationship for the long term or that they have established their household that is commensurate with that of spouses in a genuine and continuing relationship. The Tribunal was not satisfied at the time of the decision that the parties were in a genuine and continuing spousal relationship, and found that the applicant failed to meet the criteria under cl 801.221(2)(c) of the *Regulations*.
10. The Tribunal found that the applicant did not meet any alternative criteria under cl 801.221(2A), (3), (4), (5) or (6) of the *Regulations* and affirmed the decision under review. In the course of the Tribunal's reasons, the Tribunal expressly referred to the fact that there was a child of the relationship and a reference to the applicant saying that he was the primary carer, and that after work he attends to the baby. The evidence was that the sponsor had not been working. The Tribunal made reference to the applicant's current shifts meaning he finishes work at midnight three to four days a week, and to the sponsor's evidence that he changes his son's nappies and plays with him.
11. The Tribunal was not satisfied that the parties had formed a household as spouses in a genuine relationship. The Tribunal was not satisfied the relationship is recognised by others as a genuine and continuing spousal relationship. The Tribunal was not satisfied that the parties view their relationship as long term and was not satisfied the relationship was a genuine and continuing spousal relationship. The Tribunal found the applicant failed to meet cl 801.221(2)(c) of the *Regulations*.

Application to this Court

12. The ground on the application is as follows:

The Administrative Appeals Tribunal erred in finding that the applicant did not meet the requirements of cl. 801.211(2) (c) of the Migration Regulations (1994) ('the Regulations').

a. In making the relevant finding, the tribunal failed to consider the requirements of regulation 1.15A (2) and the requirement that" ... the Minister must consider all of the circumstances of the relationship". The failure to give weight to the best interests of the applicant and sponsor's Australian citizen child (Angadvir Singh Grewal) in accordance with the Convention on the Rights of the Child (CROC) is a jurisdictional error by reason of the above direction incorporated in regulation 1.15A(2) of the Regulations.

13. From the bar table, Mr Arch, solicitor for the applicants, submitted that there was a further ground not raised on which he wished to rely concerning the criteria under cl 802.221(6)(c)(ii) of the *Regulations*. The Court sought to clarify with Mr Arch whether there was any evidence in the affidavit in the court book to support that any of the categories identified under that provision and whether there was evidence in that respect before the Tribunal. Mr Arch properly confirmed that there was not. It is in those circumstances that the court refused leave to Mr Arch to raise fresh ground not in the application.
14. In relation to the ground in the application, Mr Arch submitted that the Tribunal had erred by failing to take into account the best interests of the child. Mr Arch argued that the reference in reg 1.15A(2) of the *Regulations* that, "*the Minister must consider all of the circumstances of the relationship*" it was not the subject of any restriction and was not exhaustive, and, accordingly, that this was an appropriate case in which to apply the principles identified in *Minister for Immigration and Ethnic Affairs v Teoh* (1994) 183 CLR 273. Mr Arch submitted that the application in the present case fell within the scope of Article 3 of the Convention on the Rights of the Child.
15. In the above decision of the High Court, Toohey J, who also agreed with the majority, identified the scope of the language "actions concerning children". Mr Hughes of counsel on behalf of the first respondent accepted that on the basis of a broad and benevolent construction of the Convention, the proceedings in the present case, albeit it not involving the child as a party and albeit it not involving a

visa application by the child, were capable of coming within the breadth of the concept “concerning”.

16. Mr Arch, in that regard, sought to rely upon the observations of Toohey J in that case in relation to the impact of the refusal of the visa in the present case in relation to the deportation of the applicant as a parent and the breaking up of a family in respect of the child. Mr Arch placed emphasis on the meaning and scope of the word “all” in the part of the regulation to which I have referred, and said it was neither exhaustive nor restrictive.
17. The requirements of cl 801.221(2)(c) of the *Regulations* are a matter of fact for the Tribunal as to whether the applicant is the spouse or de facto partner of the sponsoring partner, consistent with an application by the Tribunal of the requirements of s 5F of the *Act* and reg 1.15A of the *Regulations*. What cl 801.221(2)(c) of the *Regulations* identifies is a particular criteria, in respect of which there are mandatory statutory considerations which must be taken into account to determine that state of affairs. There is no consideration at large of the kind that was identified in *Minister for Immigration and Ethnic Affairs v Teoh* supra.
18. The consideration in the present case in respect of reg 1.15A(2) of the *Regulations* was itself confined by the words “of the circumstances of the relationship”. It was not a consideration at large and it was not a consideration that made relevant the best interests of the child.
19. I accept the submissions of the first respondent that the best interests of the child were not relevant to the determination of the question as to whether the criteria under cl 801.221(2)(c) of the *Regulations* were satisfied.
20. Accordingly, there was no jurisdictional error by the Tribunal as alleged in the application. The application is dismissed.

I certify that the preceding twenty (20) paragraphs are a true copy of the reasons for judgment of Judge Street

Date: 10 November 2017